Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act	)	MB Docket No. 05-181

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") hereby responds to the Notice of Proposed Rulemaking released by the Commission on May 7, 2005 ("NPRM") seeking comment concerning the implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").[1] Section 210 amends the satellite carriage requirements for local television broadcast stations in "noncontiguous states."

While the Commission correctly observes that most of the requirements imposed by Section 210 are "self-effectuating," the NPRM suggests that the Commission is considering expansively interpreting certain aspects of the statute in a manner that is clearly contrary to Congressional intent. Specifically, for example, Congress could not have intended for Section 210's requirements to extend beyond Alaska and Hawaii. Also inconsistent with Congressional intent, and indeed with the Commission's own recent digital must carry decision, is the suggestion in the NPRM that Section 210 requires satellite operators to retransmit the multicast signals of digital broadcast television stations in the noncontiguous states.

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[1] *See Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, FCC 05-92, Notice of Proposed Rulemaking, MB Docket No. 05-181 (rel. May. 2, 2005).

As for the procedural aspects of the Section 210 election process, EchoStar agrees with the Commission that it should track the existing Communications Act Section 338 election process as closely as possible. To initiate carriage under Section 210, a one-step election process with elections due on October 1, 2005, simultaneous with those for the existing must-carry regime, would be the simplest framework. This proposal would minimize confusion and burden, and has the added advantage of ensuring that satellite carriers have sufficient time to plan for complying with the Section 210 digital signal carriage requirements that commence in 2007.

I. THE COMMISSION SHOULD NOT INTERPRET SECTION 210 IN THE EXPANSIVE MANNER IT CONTEMPLATES

A. Congress Did Not Intend Section 210 To Extend Beyond Alaska And Hawaii

Section 210 instructs that its requirements apply to carriage of local stations in a "State that is not part of the contiguous United States."[2] SHVERA provides no further guidance on the meaning of "State." However, the Commission has noted that "State" is defined elsewhere in the Communications Act as including the noncontiguous territories and possessions of the United States. Therefore, the NPRM asks whether Section 210 imposes upon satellite operators the obligation to carry local stations in such far flung locales as Guam, the Northern Mariana Islands, and Puerto Rico.[3]

On its face, Section 210 was intended to apply only to Alaska and Hawaii, two isolated states with special needs. In EchoStar's view, while still cumbersome, this provision is therefore materially distinct from carriage obligations that would apply throughout the nation. As the Supreme Court and the Commission have recognized, mandatory carriage requirements

[2] SHVERA, § 210 (codified at 47 U.S.C. § 339(a)(4)).

[3] *See* NPRM at ¶ 7.

impinge upon the free speech rights of multichannel video programming distributors ("MVPDs").[4] Such requirements must accordingly pass the intermediate scrutiny test articulated by the Supreme Court in *U.S. v. O'Brien*, 391 U.S. 367 (1968) by satisfying the factors identified in the *Turner* cases as being constitutionally acceptable. As the Commission succinctly described this analysis, a must-carry requirement must further an important or substantial government interest, and the burden imposed by the obligation must be "congruent to the benefits obtained."[5]

What saves Section 210 from facial unconstitutionality is its limited scope. The same cannot be said, however, of the expansive interpretation of Section 210 that the Commission contemplates. Section 210 was intended by Congress to be geographically limited – that is, Congress only intended for satellite operators to comply with the Section 210 obligations in Alaska and Hawaii. The Commission must not ascribe to Congress an intention that would render the provision unconstitutional, or even constitutionally suspect.[6]

To preserve its constitutionality, the Commission should interpret the scope of Section 210 narrowly. If the Commission interprets the provision to apply to U.S. territories and possessions, the *O'Brien* balance would heavily weigh against constitutionality. The burdens of

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[4] *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FC 05-27 (rel. Feb. 23, 2005) ("*Digital Signal Carriage Order*") (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") which upheld the cable must-carry statute)).

[5] *Digital Signal Carriage Order* at ¶¶ 14-15.

[6] *See, e.g., United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.") (citation omitted); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (it must be assumed that Congress "legislates in light of constitutional limitations"); *Edward J. DeBartolo Corp. v. Florida Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Alemendarez-Torres v. U.S.*, 523 U.S. 224, 237-38 (1998).

compliance from a technical perspective, for example, would far exceed any governmental interest involved. U.S. satellite operators are not currently able to serve many of these areas, and certainly cannot serve a span of territory that ranges from the Atlantic Ocean to the middle of the Pacific.[7] Congress surely did not intend to impose upon satellite operators the burden of spending hundreds of millions of dollars to devote satellite capacity for the purpose of not only serving territories and possessions, but also complying with high definition ("HD") carriage obligations for these broadcast stations. While EchoStar currently offers very limited service to Puerto Rico, the Commission has recognized that attempts to provide widespread service to areas as far south of the continental U.S. as Puerto Rico and the U.S. Virgin Islands could divert power from other regions and potentially adversely affect the services of other countries.[8] Ironically, the current must-carry requirement does not exist in many of these areas which are not classified by Nielsen as Designated Market Areas. It would be highly anomalous for the Commission to interpret the Congressional scheme of carriage obligations as imposing dual and HDTV must-carry where the satellite carrier is not even subject to carry-one carry-all.[9]

In sum, the Commission should not adopt an expansive interpretation of Section 210 because doing so would impose burdens upon satellite operators that are so great as to make

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[7] *See* NPRM at ¶ 7 (recognizing that the Pacific territories and possessions are in a different International Telecommunication Union region than the U.S.).

[8] *Id.* at ¶ 7.

[9] Both Alaska and Hawaii have DMAs, in contrast to the territories and possessions. While certain areas of Alaska are not assigned by Nielsen to DMAs, Congress specifically addressed this fact by directing that "the retransmissions of the stations in at least one market in the State shall be made available to substantially all of the satellite carrier's subscribers in areas of the State that are not within a designated market area." *See* 47 U.S.C. § 339(a)(4). That such "extra-DMA" service would be an impossibility in the territories and possessions further highlights the fact that Section 210 was intended to apply only to Alaska and Hawaii.

the provision constitutionally untenable. Instead, the Commission should interpret the statute narrowly to apply to Alaska and Hawaii.

B. Congress Did Not Intend Section 210 To Impose A Multicast Carriage Requirement

Congress, moreover, could not have intended that Section 210 would require the carriage of multicast digital signals, as the Commission claims.[10] As the Commission determined in the *Digital Signal Carriage Order*, a multicast requirement advances none of the important governmental purposes underlying the must carry rules as identified in the *Turner* cases.[11] First, multicasting is not necessary to preserve the benefits of free over-the-air television for viewers because broadcasters continue to maintain their right to must-carry for their main video programming stream.[12] And the carriage of more than one programming stream from each broadcaster would not contribute to promoting the dissemination of information from a multiplicity of sources because the multicast streams would emanate from the same sources as the primary programming streams.[13] Indeed, as the Commission acknowledged, multicasting would likely have the opposite effect, diminishing the ability of other, independent voices to be carried by MVPDs.[14]

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[10] NPRM at ¶ 9 (asserting that Section 210 "does not contain any limitation on the nature of the broadcast signal that satellite operators must carry in the noncontiguous states.")

[11] *See Digital Signal Carriage Order* at ¶14 (discussing the decision in *Turner II* to uphold must-carry as furthering the important government interests of preserving the benefits of free over-the-air broadcast television for viewers and promoting the dissemination of information from multiple sources).

[12] *Id.* at ¶ 38.

[13] *Id.* at ¶ 39.

[14] *Id.*

The only interest multicasting would serve is to provide broadcasters with additional revenue streams. This is not a cognizable government interest, let alone an important one. A multicast requirement would accordingly fail the governmental interest prong of the *O'Brien* and *Turner* analysis, rendering the requirement unconstitutional. To avoid an unconstitutional construction of Section 210, the Commission should not conclude that it imposes a multicast obligation.

The Commission's divination of a multicast requirement is also premised on flawed statutory interpretation – the use of the plural term "signals" rather than "signal" in Section 210.[15] The Commission declares that Section 210's reference to retransmission of the "signals" of "each such station" in a market must refer to more than one programming stream, that is, the multicast digital signals from each station. But considering that Section 210 also uses the plural term "signals" in directing that the "*signals* originating as analog signals of *each* television broadcast station" be carried, and that analog stations do not multicast, it follows that a more reasonable interpretation of "signals" is that it refers to the signals of the multiple *stations* to be carried, not multiple signals of individual stations. Moreover, if the Commission's view of the use of the word "signals" is correct, it would seem to preclude the carriage of an HD feed, which would be a single signal, under Section 210. Use of the plural term "signals" cannot plausibly be taken as a direction from Congress that multicasting is required.

II. THE COMMISSION HAS APPROPRIATELY INTERPRETED THE MEANING OF AVAILABILITY TO "SUBSTANTIALLY ALL" SUBSCRIBERS

In construing the meaning of Section 210's statement that signals carried under the provision be made available to "substantially all" of a satellite operator's subscribers, the

[15] *See* NPRM at ¶ 9.

Commission has concluded that the provision recognizes the "physical limitations of some satellite technology that may not be able to reach all parts of a state or a DMA, particularly where a spot beam is used to provide local stations."[16] The Commission concludes further that no rules need to be adopted in this regard, as satellite carriers remain responsible for complying with the Commission's existing geographic service rules which require service where "technically feasible."[17] EchoStar concurs. The existing geographic service rules apply to both Alaska and Hawaii, provide well-established parameters for service offerings, and there is nothing in Section 210 reflecting an intention by Congress that a separate layer of service regulations be adopted to govern Section 210 carriage.

III. TO MINIMIZE CONFUSION AND BURDEN, THE PROCEDURAL RULES FOR THE ELECTION PROCESS UNDER SECTION 210 SHOULD TRACK THE EXISTING MUST-CARRY ELECTION PROCESS TO THE EXTENT POSSIBLE

As for the procedural aspects of Section 210 implementation, the Commission proposes to track, to the extent possible, the process already in place for must-carry elections under Section 338 of the Communications Act.[18] EchoStar generally agrees, as such a course will help minimize confusion and burden for satellite operators as well as affected broadcasters. In terms of fine tuning to help harmonize the Section 210 process with the existing must-carry process, EchoStar urges the Commission to adopt the proposal that a one-step process be employed for Section 210 elections, to occur simultaneously with the October 2005 elections under the existing must-carry regime.[19] A one-step process has the advantages of simplicity and

[16] *Id.* at ¶ 16.

[17] *Id.*

[18] *Id.* at ¶ 10.

[19] *See id.* at ¶ 13.

reduced burden for satellite operators and broadcasters. Moreover, requiring notifications for digital carriage in 2005 will afford satellite operators adequate planning time for implementing carriage of digital stations by the 2007 deadline.

If, however, the Commission decides to adopt the two-step election process it is also considering, a clarification is necessary. While the Commission has set forth proposed notification requirements for any new satellite carriers that will be required to comply with Section 210 after 2005,[20] the Commission has not specified notification procedures for any new DTV stations that begin broadcasting after March 1, 2007. Since carriage of digital signals is to commence by June 8, 2007, the Commission proposes to require that satellite operators notify stations by March 1, 2007 of their must-carry rights for digital signals under Section 210.[21] The Commission should clarify that stations commencing DTV service after the proposed March 1, 2007 notification deadline be required to comply with the Commission's existing rule governing new stations' must carry elections. *See* 47 C.F.R. § 76.66(d)(3).

IV. CONCLUSION

EchoStar respectfully urges the Commission to take the foregoing comments into account in developing rules to implement Section 210 of SHVERA.

[20] *See id*. at ¶ 19.

[21] *Id.*

Respectfully submitted,

/s/

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